Kara E. Pierce
Ph.D. Candidate
University of New Hampshire

"To 'Tend to the Good of the Community': The Problem of Eminent Domain in the Post-Revolutionary Period"

Introduction

> The great aim and end of civil society is protection of the persons and properties of individuals by an *equal contribution* to *whatever* is necessary to attain and secure it. For, since *all* the individuals who compose the union are to partake of its protection, and of every other benefit resulting from it; nothing can be more just than that the *expences*, *burthens*, *and sacrifices*, necessary to preserve it, should be equally distributed and proportionably sustained by *all* [*sic*].[1]

Eminent domain, or the taking of private property for the greater good, has been one of the most frequently cited topics in scholarship on the development of American law in the nineteenth-century. Legal historians such as Morton J. Horowitz, Harry N. Scheiber, James Willard Hurst, Kermit L. Hall, and Lawrence M. Friedman have clearly illustrated the significance of eminent domain and its role in the development of American society. Historians have suggested that eminent domain was initially utilized by the state to take private property for purposes of internal development—the building or widening of roads, canal construction, and the laying of railroad tracks. In the early nineteenth century, however, the power of eminent domain, traditionally a power of the state, was devolved upon individually owned corporations. When this authority was granted to corporations, it was as if the corporations, rather than the states, gained the sovereignty and authorization to expropriate land as needed. While the courts were still used when corporations were confronted with stubborn property owners who slowed

[1]Board of American Loyalists, *The case and claim of the American loyalists impartially stated and considered* (London, 1783), 17.

what was supposed to be an expedited process, corporations began to exercise the power that state legislatures once held. As a result of this transferal of power, the institution of eminent domain flourished within America.[2]

The key assumption that has led historians to base most of their analyses on the nineteenth century and the cause of internal development is that the overall position of legislators, justices, and businessmen tended towards the protection of capital and the preservation of potentially productive land.[3] Thus, the taking of privately owned land under eminent domain law has been intimately linked to the development and growth of capitalism in the Unites States. This fact has led historians to utilize eminent domain as an avenue for explaining why actions taken in "the name of vested rights had less to do with protecting [private] holdings," as was considered by many to be the most basic purpose of law, "than it had to do with protecting [public] ventures."[4]

Given the numerous analyses of eminent domain in nineteenth-century America, one may wonder what role this legal device played in late-eighteenth-century or post-revolutionary America. In his Bancroft Prize winning analysis of the development of American law, *The Transformation of American Law, 1780-1860*, Horowitz even considered the fact that "given the central role that eminent domain played in legal controversy during the nineteenth century, it is

---

[2]Harry N. Scheiber, "Property Law, Expropriation, and Resource Allocation by Government, 1789-1910," in *American Law and the Constitutional Order: Historical Perspectives*, ed. Lawrence M. Friedman and Harry N. Scheiber (Cambridge, MA: Harvard University Press, 1978), 134.

[3]For evidence that supports this notion see James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: The University of Wisconsin Press, 1956), Morton J. Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977), Harry N. Scheiber, "Property Law, Expropriation, and Resource Allocation by Government, 1789-1910," in *American Law and the Constitutional Order: Historical Perspectives*, ed. Lawrence M. Friedman and Harry N. Scheiber (Cambridge, MA: Harvard University Press, 1978).

[4]James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States*, 24. Inserted brackets are my own.

rather surprising to see how infrequently it arose as a legal question before that time."[5] But Horowitz makes a critical error when he assumes that questions and legal disputes involving eminent domain or governmental takings were relatively uncommon prior to the nineteenth-century. He assumes the early state governments did not utilize eminent domain solely because the term 'eminent domain' does not appear in the sources. This is simply not the case.

The right of a sovereign power to confiscate an individual's property was not an innovation of nineteenth-century American law. The nineteenth-century American law of eminent domain is only one episode in the continuous development of a sovereign's power to regulate property that can be identified as far back as the eighth-century BCE. This study will suggest that eminent domain, though not necessarily classified as such, was a significant factor in the development of America in the years following the Declaration of Independence and the conclusion of a successful revolution.

My dissertation will be divided into six sections—a brief history of state takings, the cause of the Loyalists, the abolition of entail, internal development prior to the nineteenth century, Indian removal, and the abolition of slavery. The discussion of these causes within the context of the developing understanding of eminent domain will provide evidence that indicates that a reassessment of eminent domain and state takings is in order. While eminent domain has largely been understood as an artifact of the process of internal development and industrialization, eminent domain also needs to be recognized as an artifact of the independence movement and the building process of the state. Today I would like to present the case of the Loyalists.

---

[5]Morton J. Horowitz, *The Transformation of American Law,* 63.

Cause of the Loyalists

> In times of such commotion as the present, while the passions of men are worked up to an uncommon pitch there is great danger of fatal extremes…Irregularities I know are to be expected, but they are nevertheless dangerous and ought to be checked, by every prudent and moderate mean.[6]

Out of all of the founding fathers, Alexander Hamilton best understood the unjust and disturbing nature of the governmental and popular actions against those colonists who remained neutral or loyal to the British Crown during the revolution. Whether this was the result of his being born outside of the British North American colonies or his living in a colony that claimed one of the highest loyalist populations, it is clear that he was uncomfortable with the many acts of legislation and popular publications made against this loathed cohort. Hamilton was not, however, against the suppression of the Tories and their attempts to rally support for their cause. But he was, as a man well versed in the law and legal theory, in favor of remedying the loyalist problem through legal means that were not overtly injurious to their former brethren.[7]

Ideally, the problem of the loyalists was supposed to be resolved through the definitive peace treaty signed by British and American representatives in September of 1783 in Paris. Unfortunately, while two of the ten articles explicitly dealt with the issue of loyalists in America, only one of them left no room for interpretation. Article VI unquestionably states that no future confiscations or injuries may be committed against anyone who was thought to have been associated with the enemy at any point during the war.[8] Article V, while much more lengthy

---

[6]Joanne B. Freeman, ed., *Alexander Hamilton: Writings* (New York: The Library of America, 2001), 44.

[7]Ibid., 45, 127. In 1784, Hamilton actually describes New Yorkers exhibiting "the most industrious efforts to violate the constitution of [the] state, to trample upon the rights of the subject, and to chicane or infringe the most solemn obligations of treaty."

[8]Great Britain, *Definitive treaty, between Great-Britain and the United States of America* (Baltimore: M. K. Goddard, 1783). Article VI: That there shall be no future confiscations made, nor any prosecutions commenced

than Article VI, exhibits many loopholes that could be and often times were easily exploited by individual state governments.

The intent of Article V of the Treaty of Paris was to see the properties of those British subjects who did not take up arms against the patriots returned to their owners. The article requests that Congress "earnestly recommend it to the legislatures of the respective states" to allow British subjects to remain in the colonies up to "twelve months, unmolested in their endeavours [*sic*] to obtain the restitution of such of their estates, rights and properties as may have been confiscated."[9] While Congress could suggest that the states uphold the sentiment expressed in the treaty, the ultimate control over confiscated property rested in the hands of thirteen individual state governments—many of the same state governments that were in debt following a very costly war.[10]

As J. Franklin Jameson has illustrated in his landmark lecture series *The American Revolution Considered as a Social Movement,* states that previously housed large Tory populations sought to gain a great deal of hard currency from confiscating the estates of the perceived traitors. Even the states that were home only to one or two large loyalist estates would

---

against any person or persons, for or by reason of the past which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage either in his person, liberty or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

[9]Ibid.

[10]Under the Articles of Confederation, the war debts were to be compiled into what was known as "common charges." When the "common charges" were completely totaled, each individual state would be assessed its share of the debt according to land value. See E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790* (Chapel Hill: The University of North Carolina Press, 1961), 203-219. For an in depth analysis of how each state attempted to pay their debts, see Roger H. Brown, *Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution* (Baltimore: Johns Hopkins University Press, 1993), 53-138.

have benefited from such confiscation acts.[11] As a result, each state fashioned its own laws regarding the confiscation of loyalist property that would best suit both its social and fiscal needs. Prior to 1783 and the passage of the Treaty of Paris, the laws passed by each state were justifiable under the law of nations. As Hugo Grotius suggested in 1625 in his study *The Rights of War and* Peace, in times of war it was just to punish anyone who was believed to be committing treason against the authorities. Who better fit this characterization than the loyalists? In the eyes of the patriots, the loyalists not only refused to join the rebel alliance, but also acted out against their former colonial brethren.

New York was one of the first states to begin passing legislation intended to disenfranchise the loyalists. By examining the legislation of New York, the reactions to the confiscation process, and its relationship to the concept of government takings, it will be possible to discern that the power of eminent domain was not always utilized for purposes of improvement. In the case of the loyalists, the state clearly utilized its authority over expropriation to punish those who did not fall in line with the rebellion against Britain.

As early as 1775, the legislature of New York began passing laws that were described by the editor of a pamphlet published in London as thoroughly "Vindictive [in] Spirit."[12] Thomas Jones, a lawyer and representative of the loyalist cause, attested to this description, finding that the most prevalent loyalist complaint focused on the idea that the government, under military

---

[11]J. Franklin Jameson, *The American Revolution Considered as a Social Movement* (Princeton: Princeton University Press, 1926), 34-36.

[12]New York (State), *Laws of the legislature of the state of New York, in force against the loyalists, and affecting the trade of Great Britain, and British merchants, ...* (London: H. Reynell, 1786), vi. The editor notes further that "were the Laws of all the States in the Union…submitted to public Consideration, it may be presumed, that the Spirit of Emigration, which has for some time past prevailed, would be at an end; as those who think themselves oppressed in their native Country, would find Misery and Distress in an extreme Degree in that Land of *Freedom and Independence*, so highly recommended by the Advocates for *America* on this Side the Water." For a further discussion of the acts passed in the state of New York prior to the Treaty of Paris, see Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005).

control, was confiscating loyalist property for their own "ease, pleasure, diversion, and emolument." Furthermore, there were no courts that would hear their cases except for those "arbitrary, illegal, despotic, and unconstitutional Courts, called 'Courts of Police.'"[13]

By 1783, however, the position of the loyalists had changed—the war was officially over and the Treaty of Paris was enacted. No longer was it justifiable for the state legislature to expropriate and destroy loyalist property. When the definitive treaty was signed between the United States and Great Britain and Congress recommended that the states take Article V into full consideration, the obstinate Senate and House of New York State refused to cede any ground to the loyalists who were stripped of their property at the start of the revolution. In the opinion of the New York legislature, it was the behavior of the loyalists who lived within the state that took actions, not the laws, which could be viewed as anything but vengeful. The loyalists had "cruelly massacred without Regard to Age or Sex, many of our [New York's] Citizens, and wantonly desolated, and laid Waste, a great Part of this State," and, therefore, could never have their rights of citizenship restored.[14]

But how seriously should these *moral* and *righteous* defenses of the legislation previously passed and refusal to enforce Article V of the Treaty of Paris be taken? Did not the patriots also participate in the destruction of property, particularly the property belonging to their perceived enemies, throughout the revolution? Were not many loyalists also "reduced to Poverty and Distress" as a result of patriot actions? Were the patriots simply rationalizing their extra-legal actions? James Rivington, a loyalist printer, for example, suffered a great deal at the hands of patriots such as Isaac Sears, John Lamb, and Marinus Willett. The destruction of Rivington's printing apparatuses in 1775 and eventual forced suspension of his presses on December 12,

---

[13]Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005), 160-163.

[14]Ibid., 167.

1783, should not be considered any differently than the suggested actions of the loyalists.[15] Property of loyalists and patriots should not be considered as two separate entities. Alexander Hamilton, while no supporter of Rivington, found the actions of the Sons of Liberty against him to be particularly egregious.

It cannot be sufficiently supported, then, that the legislature of New York had such pure motives as avenging the destruction of property within the state; if this were indeed the case, then extra-legal actions would not have been taken against the loyalists. There is, however, evidence in support of the state utilizing its authority to expropriate and refuse to restore the property of the loyalists in order to raise funds. The law passed by the House and Senate of New York in 1784 entitled "An Act for the Speedy Sale of the confiscated and forfeited Estates within this State, and for other Purposes therein mentioned" exemplifies this motive.

This purpose of this act was to direct how the property confiscated by the state from the loyalists "should be sold and converted into Money, and otherwise applied for sinking and discharging the public Securities."[16] However, on May 12, 1784, Gouverneur Morris delivered a message from the Council of Revisions expressing objection to the motion that "An Act for the Speedy Sale of the confiscated and forfeited Estates…" become a law of the state. The Council of Revisions believed that the act was "inconsistent with the Public Good."[17] Recall that the states authority to confiscate property was premised upon the notion that it was being taken for the 'good of the community'.

The Council of Revisions believed that this act was contrary to the public good based on

---

[15]Harold C. Styrett, ed., *The Papers of Alexander Hamilton* (New York: Columbia University Press, 1962), V: 300-301.

[16]New York (State), *Laws of the legislature of the state of New York*, 43.

[17]Ibid., 169.

two principle objections: Firstly, they believed that placing the sole power to "sell and dispose of all Lands, Tenements, Hereditaments and Real Estate" within the hands of seven Commissioners of Forfeiture who had the power to convey and execute deeds that would be good in law was a mistake. Giving seven men the ability to regulate all the confiscated property within the state without any checks on their power would leave the state helpless if they should abuse their position through any type of misconduct.[18] Secondly, they believed it was not lawful to accept the certificates issued to the inhabitants of the state by the Continental Loan Officer as payment for property within the state since the certificates were representative of the national debt, not the debt of New York alone. Similarly to that of the possibility of corruption within the Commissioners of Forfeiture, the council believed that in accepting certificates issued by the United States, they would be "open[ing] a Door to fresh Frauds, and giv[ing] a certain Disguise and Covering to past ones."[19]

In spite of the objections of the Council of Revisions, the Senate affirmed that the act should become a law of the state. With the affirmation of the House, the act became an official law of New York despite the fact that everyone was not in agreement that it was in the best interest of the public and that Congress had urged the states to seriously consider returning confiscated estates to their former owners. The process of proposing, attempting to revise, and passing this act illustrates not only divisions caused by the subject of loyalists and the seizing of their property, but also that many legislators were both thinking and writing within the guidelines of eminent domain that were expressed in Emerich de Vattel's *The Law of Nations*.[20] However,

---

[18]Ibid., 43, 169.

[19]Ibid., 170.

[20]Joseph Galloway, representative of the loyalist cause, also distinguished in the appendix to his work *The Claim of the American Loyalists* that the British Minister who worked on the peace treaty suggested that he had no other option but to submit to the notion that the confiscated property was "given up as the price and purchase of the

the critiques offered by the Council of Revisions in relation to this act were not the only dissension expressed against the rather oppressive laws that New York State instituted against loyalists.

In 1783, prior to the passage of "An Act for the Speedy Sale of the confiscated and forfeited Estates…," the Board of American Loyalists issued a tract which clearly outlined all of the reasons why the state legislatures were wrong for denying indemnification for the loyalist property that was taken. The central argument made in this publication is clearly stated. While the board concedes that the acts passed by the states "are justifiable under the fundamental law of *eminent domain*," he contends, utilizing the authority of Samuel von Pufendorf, that restitution must also be made for their individual sacrifices for the general safety of the public.[21] What is further, according to most jurists and political theorists who wrote treatises on the law of eminent domain, even when "a prince is compelled, *by necessity*, to alienate in a treaty a part of his dominions, the losses of individuals, whose fortunes are sacrificed to the *national safety*, must be *made good* by the nation."[22]

The Board of American Loyalists defend their claims even further against the belief that no person who committed treasonous acts against the newly formed government should have their property returned or receive compensation for their property. Numerous examples of the governments representing the side of the winning country replacing the government of the losing country are provided. After the war between Spain and what became the independent States of Holland, anyone who had lost more than their fair share of property in the name of the public

---

peace." One of the most frequently described aspects of eminent domain is the notion that subjects must be willing to surrender their property when it is in the best interest of the nation, in this case, the British nation. See Joseph Galloway, *The Claim of the American Loyalists reviewed and maintained upon incontrovertible principles of law and justice* (London: G. and T. Wilkie, 1788), 136.

[21]Board of American Loyalists, *The case and claim of the American loyalists*, 22.

[22]Ibid., 23.

good would have their estates restored to them or receive a monetary compensation. The Treaty of Utrecht signed at the conclusion of Queen Anne's War provided for the return of two prominent families estates. Perhaps most closely related to the situation of the loyalists is the treatment of French inhabitants of Canada after it was ceded to Britain during the Seven Years War. French inhabitants who would not become subjects of Britain were given complete access to dispose of their property or move it in a timely manner to French territory.[23]

Although the argument may be made that since loyalists remained subjects of the British Crown, it should be the British nation, not the American nation that should be responsible for restorations. The fact that British representatives did require the inclusion of Articles V and VI in the definitive treaty indicates that the British government did make arrangements for restoration of loyalist property and that the United States Government voluntarily took the power of compensation into their own hands. Unfortunately, as many letters of Alexander Hamilton indicate, not only did the states refuse to take Article V into consideration, but many legislatures, and in Hamilton's case the New York legislature, actively ignored the Article VI, which ordered the mandatory cessation of the seizure of loyalist estates. In Hamilton's opinion, this refusal to comply with both articles in the Treaty of Paris created much more danger than that posed by the loyalists. In a letter to George Clinton, Hamilton suggests that if the states continue to ignore certain aspects of the treaty, the possibility of renewed warfare may become a reality:

> In the eye of a foreign nation, if our engagements are broken, it is of no moment whether it is for the want of good intention in the government or for want of power to restrain its subjects. Suppose a violence committed by an American vessel on the vessel of another nation upon the high seas and after complaint made, there is no redress given. Is not that a hostility against the injured nation which will justify reprisals?[24]

---

[23]Ibid., 26-27.

[24]Harold C. Styrett, ed., *The Papers of Alexander Hamilton*, III: 368-369.

Not only does the refusal of state governments to return the property of loyalists or compensate them in another fashion seemingly undermine the laws regulating the power of eminent domain, but the refusal also undermines the laws of nature and nations. However, there is also another major issue that the state governments speak to through both their unwillingness to compensate the loyalists and cease hostilities against the estates of those who remained—sovereignty. The state governments seem to be claiming sovereignty in the mere act of exercising the right to expropriate and regulate property. But they are also undermining the national governments position of sovereignty over the power of making treaties with other nations.